Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALMAR INVESTMENT COMPANY,

Petitioner,

v.

CHARLES BRUNJES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court's application of the "reasonable relationship" test to government takings of land in exchange for routine site plan approval, whereby the landowner bears the burden of proving that the government exactions are not reasonably related to the purported impact of the proposed development, is in direct and apparent conflict with this Court's precedent in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which this Court rejected the "reasonable relationship" standard and held that "unconstitutional conditions" will result if the government fails to prove by individualized determinations that its exactions are "roughly proportional" to the purported impact of the proposed development in violation of the Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

PARTIES TO PROCEEDINGS BELOW

Petitioner

Petitioner Walmar Investment Company is a Missouri Corporation with its principal place of business in Missouri.

Respondents

Respondents Charles Brunjes, Ron Fowler, Henry Dussold, Bob Englehart, Donald Barr, Jr., Dan Brungard, Carolyn Thomas, Cheryl Hibbeler and Paul Renaud are the individual members of the City of O'Fallon, Missouri, Planning and Zoning Commission, in their official capacities. The remaining Respondent is the City of O'Fallon, Missouri.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Walmar Investment Company respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District.

OPINIONS AND ORDERS BELOW

The opinion of the Missouri Court of Appeals, Eastern District (App., *infra*, 1-14) is unreported; however, its Order affirming the trial court (App., *infra*, 15-16) is reported at 87 S.W.3d 349. The Judgment (App., *infra*, 17) and Findings of Fact and Conclusions of Law (App., *infra*, 18-38) of the trial court are unreported. The Order of the Missouri Court of Appeals, Eastern District, denying a timely Motion for Rehearing or for Transfer to the Missouri Supreme Court (App., *infra*, 39) is unreported. The Order of the Supreme Court of Missouri denying a timely Application for Transfer (App., *infra*, 40) is unreported at present.

JURISDICTION

The Order of the Missouri Court of Appeals, Eastern District, was entered on August 20, 2002. (App., *infra*, 15-16). The Missouri Court of Appeals, Eastern District, denied a timely Motion for Rehearing or for Transfer to the Missouri Supreme Court on October 8, 2002. (App., *infra*, 39). The Missouri Supreme Court denied a timely Application for Transfer on November 26, 2002. (App., *infra*, 40).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

This petition involves the Takings Clause of the Fifth Amendment of the United States Constitution, U.S. CONST. amend. V, made applicable to the States through the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. CONST. amend. XIV, § 1.

The Takings Clause states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

The Due Process Clause states in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

INTRODUCTION

This petition presents the Court with the opportunity to resolve a direct conflict with its precedent and to resolve an issue of general interest and importance, namely, whether a municipality can force a property owner to relinquish his fundamental property rights by "dedicating" substantial amounts of private property in exchange for

routine site plan approval, where the government has failed to demonstrate any "rough proportionality" between the "dedication" and the impact of the proposed development, in violation of the Takings Clause of the United States Constitution, as interpreted by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). If the lower court's opinion is allowed to stand, it will eviscerate the fundamental property rights of all Missouri citizens under the Takings Clause of the United States Constitution, because a city would be allowed to force citizens to "dedicate" rights of way for public roads across their land, and bear the cost of constructing such roads, in exchange for routine site plan approval, without the protections mandated by this Court in *Dolan*.

STATEMENT OF THE CASE

Petitioner Walmar Investment Company ("Walmar") owns approximately 18.5 acres of undeveloped commercial property in the City of O'Fallon, Missouri. Walmar presented Respondents (hereinafter collectively referred to as "the City of O'Fallon, Missouri" or "the City") with a site plan for the development of approximately 5.5 acres of this commercial property as an upscale retail center. On July 13, 1999, the City issued a preliminary report recommending approval of the development provided that Walmar comply with eleven conditions. Walmar agreed to comply with eight of the conditions, but submitted its plan for final approval absent the following three conditions which affect the entire 18.5 acre parcel:

1. That Walmar dedicate a 60-foot right of way for the construction, at Walmar's expense, of a public collector road through the parcel;

2. That Walmar dedicate a 15-foot right of way for the future expansion of an adjacent roadway; and

3. That Walmar provide cross-access easements for adjacent, private landowners, without compensation.

Walmar estimated the total loss of useable land, without compensation, at over 3.25 acres at a cost of over $1.4 million, excluding the cost of constructing the public collector road. In addition, the City's conditions would obliterate the retail development and future development of the entire 18.5 acre parcel.

The City purportedly based its conditions on a single traffic study. However, the study does not support the need for the conditions. With respect to the public collector road condition, the City's study analyzed current and projected traffic patterns and concluded that traffic would remain at "favorable" or "acceptable" levels, even during peak hours, after the completion of Walmar's proposed development. While the study ultimately recommended the public collector road condition, the recommendation was not based on any specific determination. Rather, the study's author simply stated that the public collector road condition comported with the City's comprehensive plan, a plan that was amended to include a public collector road through Walmar's property on the same day as the study was released. The study was silent on the City's purported need for the cross-access requirement, and the study also failed to address the purported need for the dedication of a 15-foot strip of land so that an adjacent road might be widened in the future.

On November 2, 1999, Walmar filed a Petition for Writ of Mandamus in the Circuit Court of St. Charles County, Missouri, in which it properly invoked the Takings Clause of the Fifth Amendment in order to compel the City to approve the site plan absent the above three conditions. On May 18, 2001, the trial court rejected the "rough proportionality" test announced by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and held that Walmar failed to prove that the City's conditions were not "reasonably related" to the purported impact of Walmar's development. (App., *infra*, 34-35). Walmar timely appealed to the Missouri Court of Appeals, Eastern District on August 20, 2002, and specifically set up and claimed that the trial court's decision was in direct and apparent conflict with this Court's precedent in *Dolan*, in which this Court rejected the "reasonable relationship" standard and held that "unconstitutional conditions" will result if the government fails to prove by individualized determinations that its exactions are "roughly proportional" to the purported impact of the proposed development in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. (Appellant's Brief, pp. 28-39).

The Missouri Court of Appeals affirmed the trial court, holding that the "reasonable relationship" and "rough proportionality" tests were comparable. Specifically, the Court of Appeals held:

> [T]he "reasonable relationship" test . . . is comparable to the "rough proportionality" test of [*Dolan*] . . . Because we find these tests comparable, we will use the language "reasonable relationship."

(App., *infra*, 7). The Court of Appeals then went on to discuss that Walmar failed to meet its burden of proof. (App., *infra*, 8).

On September 4, 2002, Walmar filed a timely Motion for Rehearing with the Court of Appeals in which Walmar specifically set up and claimed that the "reasonable relationship" test is not comparable to the "rough proportionality" test, that the burden of proof is on the government, and that the opinion is contrary to this Court's precedent in *Dolan*. (Motion for Rehearing, pp. 2-8). The Motion for Rehearing was denied on October 8, 2002. Walmar filed a timely Application for Transfer to the Missouri Supreme Court on October 23, 2002. Walmar again specifically set up and claimed that the "reasonable relationship" test is not comparable to the "rough proportionality" test, that the burden of proof is on the government, and that the opinion is contrary to this Court's precedent in *Dolan*. (Application for Transfer, pp. 2-8). The Missouri Supreme Court denied Walmar's timely Application for Transfer on November 26, 2002.

REASONS FOR GRANTING THE PETITION

This petition must be granted in order to resolve a direct and apparent conflict with this Court's precedent, and in order to restore the fundamental property rights of Missouri residents who are now at the mercy of overzealous government officials. Failure to resolve this conflict will lead to forum shopping because the federal courts sitting in Missouri correctly apply this Court's precedent, while the Missouri courts ignore it.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT IN *DOLAN V. CITY OF TIGARD*.

As will be demonstrated below, the Court of Appeals' decision is in direct conflict with this Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). To address this direct conflict, the analysis must begin with this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, this Court held that under the well-settled doctrine of "unconstitutional conditions," the government cannot require a person to give up a constitutional right – here, the right to just compensation when property is taken for public use – in exchange for a discretionary benefit conferred by the government – here, site plan approval – where the benefit sought has little or no relationship to the property. *Nollan*, 483 U.S. at 831-832;[1] *see also Dolan*, 512 U.S. at 385. This "essential nexus" test, however, left open "how close a 'fit' between

[1] In *Nollan*, the California Coastal Commission forced landowners seeking a building permit to grant a public easement over their beachfront property. *Nollan*, 483 U.S. at 831. While the government maintained that the purpose of the beachfront easement was to protect views of the beach from the street, this Court held that giving the public the right to walk along the Nollans' beachfront property was completely unrelated to the public views of the beach from the street. In addition, this Court expressed its concern that conditioning development rights on the easement amounted to a coerced physical invasion of private property. *Nollan*, 483 U.S. at 837. Since the government's demand was unrelated to its legitimate interest, this Court found that there was no "essential nexus" between the development condition and a legitimate state interest. Thus, the condition was an illegitimate use of the police power and effected a taking.

the condition and the burden is required." *Nollan*, 483 U.S. at 838.

In *Dolan*, this Court answered the question by announcing the "rough proportionality" test as the supreme law of the land. *Dolan*, 512 U.S. at 391.[2] Specifically, this Court stated:

> We think the 'reasonable relationship' test adopted by the majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. **But we do not adopt it as such,** partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. **We think a term such as 'rough proportionality' best encapsulates what we hold to be**

[2] In *Dolan*, the City of Tigard approved a building permit on the condition that the landowner dedicate a bike path and public greenway to the city. The stated purpose of the bike path dedication was to reduce traffic caused by Dolan's new building while the greenway dedication was designed to compensate for additional storm water runoff. In support of its decision, the city made generalized findings regarding the possibility of increased traffic congestion and storm water runoff as a result of Dolan's development. However, this Court held that the bike path and greenway conditions constituted a taking because the city had failed to make an "individualized determination" that the physical dedications imposed by the city were roughly proportional to the projected impacts of the development. *Id.* Therefore, the city's argument that the pedestrian/bicycle pathway "*could* offset some of the traffic demand" was insufficient to meet its burden of proof under the rough proportionality standard. *Dolan*, 512 U.S. at 395. Likewise, this Court invalidated the greenway dedication because the city's interest in flood control would be served equally as well by a private as opposed to a public greenway. *Id.* at 393.

> **the requirement of the Fifth Amendment.** No precise mathematical calculation is required, but the city must make some sort of **individualized determination** that the required dedication is related both in nature and extent to the impact of the proposed development.

Id. at 391 (emphasis added).

Together, *Nollan* and *Dolan* create a two stage analysis for assessing the constitutionality of dedications. First, a court must determine whether there is an "essential nexus" between a legitimate state interest and the dedication required by local authorities. *Nollan*, 483 U.S. at 837. Thus, if the dedications required by the government are unrelated to the stated purpose, there is no "essential nexus" and the dedication requirement constitutes a taking. Second, assuming there is an essential nexus, a court must then analyze the degree of connection between the required dedication and the projected impact of the proposed development. *Dolan*, 512 U.S. at 391. Under *Dolan*, there must be a "rough proportionality" between the two. *Id.* If the government cannot prove that its imposed dedication or exaction is "roughly proportional" to the projected impacts of the development, then the development condition effects a taking through an invalid exercise of the police power. *Id.* at 387.

In the present case, the Court of Appeals blatantly ignored the supreme law of the land and concluded that the "reasonable relationship" test comports with the Takings Clause of the Fifth Amendment because it is "comparable" to the "rough proportionality" test set forth in *Dolan*. (App., *infra*, 6a). The "reasonable relationship" test, however, does not require the government to make and prove an individualized determination that a site plan

condition is roughly proportional to the projected impact of the development. *Dolan*, 512 U.S. at 374. As predicted by this Court in *Dolan*, the Court of Appeals confused the "reasonable relationship" test with a "rational basis" standard, applied a minimal level of scrutiny, and required Walmar to prove that the City's takings were not reasonably related to the purported impact of the proposed development. *Id.* at 391. This confusion is precisely why this Court rejected the "reasonable relationship" test. *Id.*

This Court in *Dolan* went to great lengths to resolve conflicting and confusing standards which were being applied to unconstitutional conditions by the highest courts of many States. *Id.* at 389-391. This Court announced the "rough proportionality" test because it "best encapsulates what we hold to be the requirement of the Fifth Amendment." *Id.* at 391. Uniform application of this supreme law of the land is necessary to protect the fundamental property rights of American landowners. Missouri landowners, however, are not equally protected because their fundamental property rights are only being afforded a minimal level of scrutiny.

This Court should grant Walmar's petition in order to correct Missouri's direct and apparent conflict with the supreme law of the land.

II. THE DECISION BELOW SHIFTS THE BURDEN OF PROOF IN DIRECT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT, THUS EXPOSING FUNDAMENTAL PROPERTY RIGHTS TO EXTORTION BY OVERZEALOUS LOCAL REGULATORS AND THEREBY FORCING CITIZENS TO CHOOSE BETWEEN SITE PLAN APPROVALS AND THEIR FUNDAMENTAL RIGHT TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT.

A critical aspect of the *Dolan* "rough proportionality" analysis is that ***the City*** **bears the burden of proof.** *Dolan*, 512 U.S. at 391 n.8, 395; *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. (Ark.) 1998). This burden shifting is a necessary corollary of the requirement that the City make an "individualized determination" that the conditions imposed are roughly proportional to the projected impacts of the development. The rationale for placing the burden on the government is twofold. First, conditioning approval of a development upon the physical dedication of land to the government effects a physical invasion of property and the accompanying loss of the fundamental right to exclude others. This Court has long recognized that the "right to exclude others is one of the most essential sticks in that bundle of rights that are commonly characterized as property." *Dolan*, 512 U.S. at 393. Thus, the City must carefully justify the need for interfering with this fundamental aspect of property.

Second, where, as here, the government demands individual parcels of land as a condition of development,

there is a heightened risk of extortion by overzealous local regulators.[3] *Id.* at 387; *see also*, *Nollan*, 483 U.S. at 837 (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). The attention this Court gave to unconstitutional conditions in *Nollan* and *Dolan* "derives from the frank acknowledgment that states might use conditions in combination with the exercise of their discretionary power to elude the confines of the Constitution and accomplish what might otherwise be clearly impermissible." *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996).

Despite *Dolan*, the Court of Appeals assumed that the "reasonable relationship" test and the "rough proportionality" test are comparable and, therefore, the Court of Appeals applied the minimal level of scrutiny and failed to shift the burden of proof when it concluded that "Walmar is not entitled to relief in that **it failed to prove** that its site development plan complied with the applicable O'Fallon ordinances **and also did not demonstrate** any failure by O'Fallon to satisfy the reasonable relationship test in requiring the conditions for the approval of the site plan." (App., *infra*, 7a) (emphasis added).

Missouri's refusal to properly apply the *Nollan-Dolan* analysis now forces Missouri residents to choose between giving up their fundamental property rights or defending them on an unlevel playing field which favors "gimmickry"

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[3] For example, in the present case, the results of the City's traffic study did not support the need for the public collector road condition. Nonetheless, the study's author recommended this condition only because it comported with the City's comprehensive plan, a plan that was conveniently amended to include a public collector road through Walmar's property on the same day as the traffic study was released.

and conversion of valid regulations of land use into "'an out-and-out plan of extortion.'" *Dolan*, 512 U.S. at 387 (citing *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates*, 432 A.2d at 14-15 (N.H. 1981)). If the decision below is allowed to stand, the authority of Missouri's local governments will go unchecked and will be "set completely adrift from its constitutional moorings." *Dolan*, 512 U.S. at 387.

As set forth in Part I, above, this Court rejected the "reasonable relationship" test, "partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Dolan*, 512 U.S. at 391. As a result, this Court announced the "rough proportionality" test as the supreme law of the land. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." *Id.*

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Dolan*, 512 U.S. at 384.

Without question, had the City simply required Walmar to dedicate its land and build a public collector road at its own expense, rather than conditioning site plan approval on such a dedication, a taking would have occurred. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384.

Such a dedication and resulting access by the public to Walmar's property would deprive Walmar of its fundamental right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan*, 512 U.S. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up fundamental property rights in exchange for routine site plan approval. *Dolan*, 512 U.S. at 385.

Without this Court's intervention, the fundamental rights of Missouri residents will be subservient to extortion by overzealous local regulators. Therefore, this Court should grant the petition.

III. THE DECISION BELOW IS NOT ONLY IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT, IT ALSO IS IN DIRECT CONFLICT WITH THE EIGHTH CIRCUIT COURT OF APPEALS, IN WHICH MISSOURI SITS, THUS SUBJECTING MISSOURI RESIDENTS TO INCONSISTENT APPLICATION OF THE LAW BASED ON THE FORUM.

In *Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996) ("*Goss I*") and 151 F.3d 861 (8th Cir. 1998) ("*Goss II*"), the Eighth Circuit Court of Appeals properly adhered to and applied the precedent set down by this Court in *Nollan* and *Dolan* to petitioner's assertion that the City of Little Rock had conditioned his rezoning request on the dedication of 22 percent of his 3.7 acres of property for future expansion of an adjacent highway. *Goss I*, 90 F.3d at 307; *Goss II*, 151 F.3d at 862.

The Eighth Circuit properly invoked this Court's caution that there are constitutional limits to regulating land use: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Goss I*, 90 F.3d at 308 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 416 (1922)).

The Eighth Circuit then addressed the question of whether the City of Little Rock was using its police powers "as leverage to extract the concession of a constitutional right – compensation for property taken." *Goss I*, 90 F.3d at 309. The Eighth Circuit remanded *Goss I* for proper application of *Dolan's* "rough proportionality" test. *Goss I*, 90 F.3d at 310. In *Goss II*, the Eighth Circuit affirmed the district court's conclusion that the City of Little Rock had failed to carry its burden of proving compliance with *Dolan's* requirement that the government make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Goss II*, 151 F.3d at 863 (quoting *Dolan*, 512 U.S. at 391). While the City of Little Rock argued that it had a legitimate reason for demanding the dedication, it did not prove that the legitimate reason was proportionate to the demand. *Goss II*, 151 F.3d at 863.

While the primary reason for granting this petition is based on the Court of Appeals' direct conflict with *Dolan*, the Eighth Circuit's proper application of *Dolan* illustrates the dilemma a Missouri landowner will face when deciding whether to pursue his fundamental right to just compensation or whether to simply give in to unconstitutional conditions. A Missouri landowner who can establish jurisdiction in federal court will be assured of proper treatment of this Court's precedent, while a Missouri

landowner bound to state court after exhausting administrative remedies by statute or ordinance will not. This obviously will result in forum shopping and inconsistent treatment of this Court's precedent.

This petition should be granted in order to prevent forum shopping for proper application of this Court's precedent.

CONCLUSION

The lower court departed from this Court's precedent in applying the "reasonable relationship" test, a minimal level of scrutiny, rather than the "rough proportionality" test, to government exactions of land in exchange for routine site approval, and thus shifted the burden of proof to the landowner. Such a departure has a direct effect on the application of the United States Constitution to a Missouri property owner's fundamental right to exclude others and to be free from overzealous government officials and their propensity for conditioning site plan approvals on exactions such as those imposed on Walmar by the City of O'Fallon, Missouri. If the opinion is allowed to stand, it will eviscerate the property rights of all Missouri citizens under the Takings Clause of the United States Constitution, because a city would be allowed to force citizens to "dedicate" rights of way for public roads across their land, and bear the cost of constructing such roads, in exchange for routine site plan approval, without the protections mandated by this Court in *Dolan v. City of Tigard*.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[SEAL]

In the Missouri Court of Appeals

Eastern District

DIVISION TWO

Walmar Investment Company, Relator/Appellant, vs. Charles Brunjes, et al., Respondents.	)	No. ED79607 Appeal from the Circuit Court of St. Charles County Honorable Nancy Schneider Filed: August 20, 2002

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Walmar Investment Company (Walmar) appeals from the trial court's judgment denying Walmar's petition for writ of mandamus attempting to compel the City of O'Fallon[1] (O'Fallon) to approve Walmar's proposed site plan absent three conditions imposed by O'Fallon. We affirm.[2]

O'Fallon is a fourth-class city and one of the fastest growing cities in Missouri. Its main and central thoroughfare is Highway K. The level of traffic on Highway K has increased significantly in the past few years and is expected to increase as development in O'Fallon continues.

O'Fallon has adopted ordinances regulating improvements and land development in O'Fallon. The general purpose of these ordinances is to regulate and control land development so as to promote public safety, health and the general welfare of the community. Section 405.010.B. O'Fallon has also adopted a Comprehensive Plan to promote these purposes and to protect the interests of the public.

Pursuant to O'Fallon ordinances, the Planning and Zoning Commission (Commission) is empowered to review site plans for proposed developments within O'Fallon. Section 400.570. The ordinances set forth the standards for such site plan review:

---

[1] Respondents are all the individual members of the Planning and Zoning Commission for the City of O'Fallon in their official capacities, as well as the City of O'Fallon. We will refer to them collectively as O'Fallon.

[2] O'Fallon's motion to dismiss is herein denied.

In reviewing the Site Plan, the Commission shall ascertain whether it is consistent with all regulations of the Zoning Code. Further, in consideration of each Site Plan, the Commission shall endeavor to assure the following:

1. That the movement of vehicular and pedestrian traffic within the site and in relation to access streets shall be safe and convenient.

2. That provisions are made so that the proposed development will not be harmful to the existing and future uses in the immediate area and the vicinity.

Section 400.585.

The Walmar property consists of approximately 18.5 acres of undeveloped land situated on the east side of Highway K and north of Weldon Spring Road in O'Fallon. In 1997, Walmar submitted a site plan for the development of approximately 5.5 acres of the property as an upscale retail center to be known as Kingsmill. This initial site plan provides for private interior roads designed to regulate on-site traffic and allow access to and from Kingsmill via Highway K and Weldon Spring Road. This original plan, dated June 5, 1997 called for a thirty-foot interior drive, however that plan was withdrawn as Walmar encountered difficulties obtaining sewer easements. Once those issues were resolved, Walmar resubmitted its site plan in June of 1999.

On July 13, 1999, the Commission staff issued a preliminary report recommending approval of the Kingsmill site plan contingent on Walmar's compliance with eleven conditions. Walmar agreed to comply with eight of the conditions but objected to three. The three conditions

were that Walmar dedicate a right of way for future expansion of Weldon Spring Road; provide cross-access to Kingsmill for adjacent landowners; and build a public collector road running through the site from Highway K to Weldon Spring Road as deemed necessary by a traffic study.

In September of 1999, Walmar submitted another plan for final approval while maintaining its objections to the public collector road, cross-access, and right of way for future expansion of Weldon Spring Road.

On September 28, 1999, Commission held a public hearing to review the Kingsmill site plan. The Commission voted to approve the plan, which included the three conditions of which Walmar had voiced objection.

On November 2, 1999, Walmar filed a petition for writ of mandamus requesting the court to compel O'Fallon to approve Walmar's proposed site development plan. O'Fallon had granted approval of the site plan subject to conditions including the construction of a thirty-six foot wide public collector street through the development, granting cross-access to adjoining developers and granting a right-of-way for the widening of Weldon Spring Road. Walmar refused to comply with the previous conditions but contends it satisfied all the requirements of O'Fallon's ordinances for site plan approval and that the conditions imposed by Commission violated its constitutional rights.

O'Fallon filed a motion to dismiss on the grounds that the trial court lacked subject matter jurisdiction. The trial court denied O'Fallon's motion and the case was tried to the court on December 7 and 8, 2000. On May 18, 2001, the trial court entered judgment in favor of O'Fallon. Walmar appeals. Other facts will be adduced as needed.

In its first point on appeal, Walmar contends that the trial court erred in entering judgment for O'Fallon in that the trial court erroneously applied the "reasonable relationship" test rather than the "rough proportionality" test in reviewing O'Fallon's conduct, that the trial court incorrectly placed the burden of proof on Walmer and that the evidence fails to show that any of O'Fallon's conditions are roughly proportional to the impact of Walmar's proposed development.

We review mandamus proceedings as we do other non-jury matters. *State ex rel. Kelcor, Inc. v. Nooney Realty Trust, Inc.,* 966 S.W.2d 399, 402 (Mo. App. E.D. 1998). We will reverse the trial court's ruling if "no substantial evidence exists to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Id.* quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Further, a bench-tried judgment that reaches a correct result will not be set aside if the trial court gives a wrong or insufficient reason for its judgment. *Fix v. Fix,* 847 S.W.2d 762, 766 (Mo. 1993).

Mandamus is an extraordinary legal remedy, which should not issue unless the party seeking the writ demonstrates a "clear, unequivocal, specific right to have performed the thing demanded and that the defendant or respondent has a corresponding duty to perform the action sought." *State ex rel. J.S. Alberici, Inc. v. City of Fenton*, 576 S.W.2d 574, 579 (Mo. App. E.D. 1979).

City was vested with "considerable discretion in determining whether the [development] meets the standards established by the ordinance." *State ex rel. Westside Development Co., v. Weatherby Lake,* 935 S.W.2d 634, 639-40 (Mo. App. W.D. 1996). When the findings of fact of the

Commission are supported by competent and substantial evidence, the reviewing court is not authorized to substitute its judgment for the judgment of the Commission. *Id.*

In examining the constitutionality of the conditions, the trial court found that the approval conditions met the "reasonable relationship test" but went on to further analyze the conditions under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* together create a two-stage analysis for assessing the constitutionality of conditional approvals. First, it must be determined whether there is an "essential nexus" between a legitimate state interest and the condition required by City. *Nollan*, 483 U.S. at 837. If the required conditions are unrelated to the stated purpose, there is no "essential nexus" and the conditional requirement would constitute a taking. Second, assuming there is an essential nexus, it must be analyzed to determine the degree of connection between the required dedication and the projected impact of the proposed development. *Dolan*, 512 U.S. at 391. Under *Dolan*, there must be "rough proportionality" between the two. *Id.* The *Dolan* Court stated:

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.
>
> *Id.*

One analysis of *Dolan* suggests that *Dolan* requires examination of three relationships: 1) whether the exaction

alleviates the created harm; 2) whether the development created the need in question; and 3) whether the extent of the exaction is proportionate to that portion of the need attributable to the development. Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 548 (1995).

In *State ex rel. Noland v. St. Louis County,* 478 S.W.2d 363, 367, the Missouri Supreme Court in delineating the "reasonable relationship test" quoted, "a [developer] may be compelled only to assume a cost which bears a rational nexus to the needs created by, and benefits conferred upon, the [development.]" Further, the court quoted, "[j]ustification of conditions depends upon there being some real relationship between the thing wanted by the landowner from government and the quid pro quo exacted by the government therefor." *Id.* Both Missouri's *Noland* and the Supreme Court decision in *Dolan* attempt to strike a reasonable balance between the property rights of landowners and the legitimate planning needs of local governments.[3] After reviewing the relevant caselaw and law review analysis, we find that the "reasonable relationship" test utilized here and found in *Noland* is comparable to the "rough proportionality" test of *Dolan*. Both tests result in the same conclusion, that government may impose conditions to offset the impact of development, but the conditions must relate to and flow from the development itself. Because we find these tests comparable, we will use the language "reasonable relationship."

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[3] For a thorough analysis of the impact of *Nollan* and *Dolan*. *See* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan,* 15 N. Ill. U.L. Rev. 513 (1995).

As will be illustrated below, Walmar is not entitled to relief in that it failed to prove that its site development plan complied with the applicable O'Fallon ordinances and also did not demonstrate any failure by O'Fallon to satisfy the reasonable relationship test in requiring the conditions for the approval of the site plan.

We will address the conditions individually. The first condition required that Walmar construct a public collector road. Walmar's own site development plan included a street that was designed to gather traffic from the side streets in the development and carry it to and from Highway K and Weldon Spring Road. This road as depicted met the definition of a "collector street" but failed to meet the standards of a collector street set out by O'Fallon ordinances.

Chapter 405 of O'Fallon ordinance is entitled Subdivision and Land Development. Section 405.030 of O'Fallon ordinances defines collector streets as streets that "gather traffic from local streets and carry it to arterial streets where such traffic can then proceed to its destination." The "minimum rights of way should be sixty (60) feet and pavement width should be thirty-six (36) feet." Section 405.380.A illustrates that collector width standards are applicable to streets that are traveled by approximately 2,500 vehicles per day. Section 405.380.C states "[t]he need for and location of collector . . . streets will be determined on the basis of traffic generated by the surrounding developments as well as the development itself." It should be noted that reducing traffic congestion is a legitimate public purpose of the type upheld by the Supreme Court. *Dolan,* 512 U.S. at 384.

Craig Holan, a transportation planner testified to the results of traffic studies for Kingsmill and surrounding developments. Holan testified that the traffic through Kingsmill would approximate 2,500 vehicles per day once development was completed. He also testified that the collector road requirement made by O'Fallon was directly related to Walmar's proposed site plan and would alleviate the burden Walmar's development would contribute to traffic in the area.

Thomas Ashburn, director of development services for O'Fallon, testified that the public collector road and the cross-access conditions were designed to assure that the traffic movement within the site and in relation to access streets would be safe and convenient.

The evidence in the case at bar demonstrated that a public collector road through Kingsmill will alleviate the burden Walmar's development will contribute to traffic in the area. Highway K, as O'Fallon's main thoroughfare, is already heavily traveled with traffic levels expected to increase as future developments are completed. By building the street to collector street standards, O'Fallon can ensure that the public has a safe and convenient means of traversing the Walmar property. Further, O'Fallon will be able to control access to the road, provide police protection, snow removal and other required maintenance to a street that will be heavily traveled by residents and visitors to Kingsmill. O'Fallon has met the reasonable relationship test as to this condition.

The second condition required that Walmar provide cross-access to Kingsmill from adjacent properties. Holan testified that the cross-access will alleviate traffic from going on and off of Highway K and disrupting the flow of

traffic. Ashburn testified that by its nature of being a retail type use, Kingsmill will attract people to and from its property and the cross-access required by O'Fallon would allow people to do this without impeding traffic on Weldon Spring Road or on Highway K. Cross-access between Kingsmill and neighboring developments will mitigate traffic on Highway K and Weldon Spring Road by allowing vehicles to travel from one development to another without going onto these major roads. O'Fallon has met the reasonable relationship test as to this condition.

The third condition required that Walmar, if or when it develops the property that runs along Weldon Spring Road, grant a right-of-way for the widening of Weldon Spring Road. The record demonstrates that when Walmar develops the property fronting Weldon Spring Road, traffic will increase. Dedication of a right-of-way to widen Weldon Spring Road will help accommodate this additional traffic. It was noted in the record, by Walmar's expert, that it is a common practice for cities to request developers to dedicate a right-of-way as a condition of developing the property. O'Fallon has met the reasonable relationship test as to this condition. Point denied.

In its second point on appeal, Walmar contends the trial court erred in that it reviewed O'Fallon's conduct under an "abuse of discretion" standard whereas *Dolan*'s "rough proportionality" test applies. We will uphold a bench-tried judgment that reaches a correct judgment even if the trial court gives a wrong or insufficient reason for its judgment. *Fix v. Fix,* 847 S.W.2d 762, 766 (Mo. 1993). As illustrated in point one, the evidence was analyzed under Missouri's "reasonable relationship test" with

standards such as those set out in *Dolan* and we find that O'Fallon met such test. Point denied.

In its third point on appeal, Walmar contends that the trial court erred in its judgment for O'Fallon in that the cross-access condition is a violation of Article I, Section 28 of the Missouri Constitution.

Appellant must cite authority in support of its points relied on if the point is one for which precedent is appropriate and available. *Luft v. Schoenhoff,* 935 S.W.2d 685, 687 (Mo. App. E.D. 1996). If appellant fails to support a contention with relevant authority or argument beyond conclusions, the point is considered abandoned. *Id.* "Authorities should be cited or discussed in the argument supporting the point relied on or a rationale must be advanced explaining why such authority is unavailable." *Id.* A point relied on which is not properly briefed shall not be considered. *See also* Rule 84.13.

Walmar fails to cite beyond a general reference to *Dolan* how the cross-access condition imposed by O'Fallon constitutes a taking for private use. As Walmar failed to support its third point with relevant authority or argument beyond conclusions, its point is considered abandoned and shall not be considered.

In its fourth point on appeal, Walmar contends the trial court erred in entering judgment for O'Fallon on the basis that the collector road condition was mandated by O'Fallon's Comprehensive Plan and other ordinances because the judgment erroneously applies that law and is not supported by substantial evidence in that the comprehensive

plan and ordinances do not mandate the collector road condition.[4]

We will not set aside a judgment that reaches a correct result even if the trial court gives a wrong or insufficient reason for its judgment. *Fix v. Fix,* 847 S.W.2d 762, 766 (Mo. 1993).

In its judgment the trial court found that:

> The approval condition to widen Walmar's proposed street from 27 feet to 36 feet wide and to make it a public street to conform to the City's ordinances and to the City's Comprehensive Plan was directly related to the site development and required by the level of traffic and traffic patterns that it will create. The only difference between what Walmar proposed and the approval condition is that instead of being 27 feet or 30 feet wide, the pavement of the road would be 36 feet wide and would be owned and maintained by the City. The condition was a result of a careful and thorough and integrated plan to deal with the traffic and the impact on the surrounding area and roads that will be created and contributed to by Walmar's development of the site.

The street depicted on Walmar's site development plan met the definition of a "collector street" found in Section 405.030 of O'Fallon ordinances as it was designed to "gather traffic from local streets and carry it to arterial streets where such traffic can then proceed to its destination." Further,

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[4] Alternatively, Walmar contends if the Comprehensive Plan and ordinances do mandate the condition, they violate the takings clause. For our analysis of this argument see Walmar's first point.

Section 405.380A illustrates that collector width standards are applicable to streets that are traveled by approximately 2,500 vehicles per day. Section 405.380C states "the need for and location of collector and arterial streets will be determined on the basis of traffic generated by the surrounding developments as well as the development itself."

The evidence established that the Kingsmill site would generate approximately 2,500 vehicles per day.

The street included in Walmar's site plan met the definition of a collector road both by design and by its anticipated future use. The trial court did not err in finding the condition of the collector road valid. Point denied.

In its fifth and sixth points on appeal, Walmar alleges the trial court erred in entering judgment for O'Fallon based on the propriety of Walmar filing a petition for writ of mandamus.

"Ordinarily, mandamus will not issue to control the discretion of an administrative body." *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization,* 943 S.W.2d 752, 755 (Mo. App. E.D. 1997). "However, an exception to this general rule exists when "the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it." *Id.* at 755-56. Further, "[m]andamus is an appropriate remedy, whether or not administrative remedies have been exhausted, if an administrative body has acted unlawfully or exceeded its jurisdiction." *Id.* at 756. In *State ex rel. Noland v. St. Louis Country,* 478 S.W.2d 363, 368 (Mo. 1972), a case with

similar facts, the Missouri Supreme Court found that mandamus was a proper remedy. Therefore, we deny these points based on *Noland*.

In its seventh point on appeal, Walmar alleges the trial court erred in adopting verbatim O'Fallon's proposed Findings of Fact and Conclusions of Law. Walmar alleges such a practice violates its due process rights in that there are material inconsistencies between O'Fallon's proposed Findings of Fact and Conclusions of Law and the actual facts and correct law.

"It is within a court's discretion to adopt the entirety of a party's proposed findings." *Goad v. State,* 839 S.W.2d 749, 751 (Mo.App. W.D. 1992). "A court may even adopt such findings of fact and conclusions of law verbatim without *per se* error occurring." *Id.* Further, we may affirm the judgment if the trial court has reached the right result even if the trial court gives wrong or insufficient reasons for its judgment. *Fix*, 847 S.W.2d at 766.

Although this court does not condone the adoption of one parties' verbatim proposed Findings of Facts and Conclusions of Law, we find no error in this case because the result reached by the trial court was correct.

Judgment is affirmed.

WALMAR INVESTMENT COMPANY,
Relator/Appellant,

v.

Charles BRUNJES, et al., Respondents.

No. ED 79607.

Missouri Court of Appeals,
Eastern District,
Division Two.

Aug. 20, 2002.

Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 8, 2002.

Application for Transfer Denied Nov. 26, 2002.

Appeal from the Circuit Court of St. Charles County; Nancy Schneider, Judge.

William J. Travis, Kevin F. Hormuth, Greensfelder, Hemker & Gale, P.C., St. Louis, for Walmar Investment Company, relator/appellant.

Mark Piontek, Lewis, Rice & Fingersh, L.C., Washington, for respondents.

Before GEORGE W. DRAPER III, P.J., and MARY R. RUSSELL, J., and MARY K. HOFF, J.

ORDER

PER CURIAM.

Walmar Investment Company (Walmar) appeals from the trial court's judgment denying Walmar's petition for writ of mandamus attempting to compel the City of

O'Fallon[1] (O'Fallon) to approve Walmar's proposed site plan absent three conditions imposed by O'Fallon.[2]

We have reviewed the briefs of the parties, the legal file, and the record on appeal and find the claims of error to be without merit. No error of law appears. An extended opinion reciting the detailed facts and restating the principles of law would have no precedential value. Judgment affirmed in accordance with Rule 84.16(b).

The parties have been furnished with a memorandum, for their information only, setting forth the reasons for the order affirming the judgment pursuant to Rule 84.16(b).

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[1] Respondents are all the individual members of the Planning and Zoning Commission for the City of O'Fallon in their official capacities, as well as the City of O'Fallon. We will refer to them collectively as O'Fallon.

[2] O'Fallon's motion to dismiss is herein denied.

IN THE CIRCUIT COURT OF THE
COUNTY OF ST. CHARLES
STATE OF MISSOURI
CIRCUIT JUDGE DIVISION

WALMAR INVESTMENT COMPANY,	)	
Relator,	)	
	)	Cause No. 99CV124095
vs.	)	Division No. 2
CHARLES BRUNJES, et al.,	)	
Respondents.	)	

JUDGMENT

(Filed May 18, 2001)

After considering the law and the evidence presented at the trial, the court denies Relator Walmar Investment Company's petition for writ of mandamus.

/s/ Nancy Schneider 5/18/01
Judge Nancy Schneider
Circuit Judge

IN THE CIRCUIT COURT OF THE COUNTY OF ST. CHARLES STATE OF MISSOURI CIRCUIT JUDGE DIVISION

WALMAR INVESTMENT COMPANY,	)	
Relator,	)	Cause No. 99CV124095
vs.	)	Division No. 2
CHARLES BRUNJES, et al.,	)	
Respondents.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 18, 2001)

This case was tried before the court without a jury on December 7 and 8, 2000. Relator called as witness Robert Heckmann, Dimitros J. Zavradinos and Norman Roden. Respondents called as witnesses Thomas Ashburn, Craig Holan, Charles Brunjes, Carolyn Thomas and James Grabenhorst. It was stipulated that Daniel Brungard, who was offered as a witness, would testify to the same facts and opinions as Charles Brunjes and Carolyn Thomas and that his testimony on those issues would be the same.

Having heard all of the evidence submitted and having reviewed the pleadings, motions, and legal memoranda filed herein, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Relator is Walmar Investment Company ("Walmar"), a Missouri corporation controlled by Robert Heckmann.

2. Respondents are the City of O'Fallon, Missouri, a fourth-class city, and nine members of the City of O'Fallon's Planning & Zoning Commission ("Commission") in their official capacities.

3. Heckmann through Walmar and family trusts owns or controls approximately 18.5 acres of undeveloped land situated east of Highway K between Highway K and Weldon Spring Road, in the City of O'Fallon, Missouri ("O'Fallon"). It abuts Highway K and Weldon Spring Road. The property is zoned C-3 Highway Commercial. Walmar previously has developed other commercial developments in St. Louis County.

4. O'Fallon is one of the fastest growing cities in the State of Missouri. In less than four years it is projected to be the second largest city in the St. Louis metropolitan area with approximately 75,000 residents, second only to the City of St. Louis in population. The number of residential and commercial developments being planned and constructed in O'Fallon is increasing at a rapid rate.

5. Only two major thoroughfares run north and south from Highway K to Highway 70 through O'Fallon. The main and central thoroughfare is Highway K, often referred to as O'Fallon's Main Street. In the past few years, O'Fallon has upgraded and improved Highway K from a two-lane road to a five-lane major thoroughfare with two lanes in each direction and a separate turn lane. The level of traffic on Route K has increased significantly

in the past few years and it is expected that the level of traffic will continue to increase as the development in O'Fallon continues. The south portion of Highway K near the intersections of Highways 40 and K is one of the most active areas of development in O'Fallon.

6. Pursuant to Chapter 89, R.S.Mo., O'Fallon has a Planning & Zoning Commission consisting of ten citizens, including the mayor. The Commission plans for the probable future growth of O'Fallon, reviews preliminary subdivision plats and site development plans for approval and provides for the orderly growth and harmonious development of O'Fallon to make sure that the people who live and work in the community and those who are simply passing through are able to get to and from their homes and businesses and through the city as smoothly and safely and with the least disruption and delay as possible.

7. Pursuant to Chapter 89, R.S.Mo., O'Fallon has adopted a Comprehensive Plan, which among other things, reflects major roads and streets in O'Fallon.

8. Planning & Zoning are integrated functions in O'Fallon. No development is considered in isolation but is reviewed in the context of the surrounding area. In reviewing site development plans, the Commission endeavors to assure that O'Fallon's planning is sufficient and adequate to mitigate and minimize the burdens that planned developments will create, including increased levels of traffic, disruptions and delay in the flow of traffic, and adverse affects on the patterns of traffic and safe travel. The Commission endeavors to assure that developments along Highway K are planned so as to avoid the types of disruptions and delay in traffic that is experienced on

other congested roads in the St. Louis Metropolitan area such as Manchester Road in St. Louis County.

9. The evidence showed that the widening of Highway K and the responsible judgment and planning exercised by the Commission has substantially enhanced the value of commercial property along Highway K in O'Fallon. It has resulted in large increases in property values in the past few years. Developed property along Highway K which has signalized access is valued in the $18 per square foot range.

10. Between 1986 and 1993, Heckmann assembled the 18.5 acre track [sic] which is part owned by Walmar, part owned by a trust under the will of Walter Heckmann, and part owned by Robert Heckmann as trustee of a revocable trust of Robert Heckmann. Heckmann acquired the property with the intention of developing it commercially. At the time Heckmann acquired the property, Weldon Spring was a two lane gravel road and Highway K was just a two-lane asphalt road. Its value has increased substantially because of the improvements to Highway K and the growth of commercial and residential developments in O'Fallon. The Walmar site is situated in what is called the "Golden Triangle" of St. Charles County, one of the most desirable areas in the St. Louis Metropolitan area for commercial development.

11. In or about 1997, Walmar began the process for developing its site that borders Highway K and Weldon Spring Road. It would be Walmar's largest development and would also rank as a major development in O'Fallon along the south Highway K corridor.

12. In June 1997, Walmar submitted its preliminary site development plan for the property. The plan showed

details of development for about five acres of the tract, with the remaining acres marked for future development. The site plan showed a paved street 30 feet wide running through the property from Highway K to Weldon Spring Road with arterial roads on the property flowing into it. The Planning & Zoning Commission staff reviewed the proposed site development plan and submitted its comments and recommendations to Walmar. The comments advised Walmar that (1) its site plan did not comply with the City's ordinances requiring commercial drives in O'Fallon to be 36-feet wide and built to collector street standards; (2) the City will need a right-of-way dedication along Weldon Spring Road; and (3) the site plan is not in conformance with the City's Comprehensive Plan.

13. O'Fallon's ordinances, Sections 400.035, 405.030, 405.180, 405.380 and 405.110, define the street shown on Walmar's plan as a "collector's street" which is required to be a minimum of 36 feet wide within a 60-foot right-of-way. The street shown on Walmar's June 1997 site plan did not comply with the requirements of these ordinances.

14. In July 1997 Walmar asked O'Fallon's planning department to put its request for approval of its site development plan on hold, explaining that it was having difficulty obtaining access to a sanitary sewer.

15. Two years later, in June 1999, Walmar returned and submitted a revised site development plan to the Planning & Zoning Commission for the same site. Like the site development plan submitted by Walmar in June 1997, its revised site development plan showed a 30-foot wide paved street running from Highway K through the property to Weldon Spring Road. It showed only detailed development for approximately 5 acres of the 18.5 acre site

with the remaining acres marked for future development. The site development plan was for a commercial shopping mall, including a proposed restaurant. It proposed access from Highway K and Weldon Spring Road. Like the site plan Walmar had submitted in June 1997, it failed to comply with the City's ordinances relating to streets.

16. During the same time frame when Walmar submitted its revised development plan in June 1999 other developers were submitting site development plans for sites along the south Highway K corridor in close proximity to the Walmar site. Taylor Morley submitted a site development plan for property north of and adjacent to the Walmar site. Taylor Morley's planned development consisted of a combination of residential and commercial development and was situated between Highway K and Weldon Spring Road on the east. Mobil Mart submitted a site development plan for a convenient [sic] store and gas station directly across Highway K from the Walmar proposed site on the southwest corner of Crusher Drive and Highway K. A Quik Trip convenience store and gas station was being proposed for the northeast corner of Weldon Spring Road and Highway K. Additionally, two large High Tech office park developments were being planned on both sides of Highway K near its intersection with Highway 40. These two developments alone will comprise more than two million square feet of office space.

17. The developments being proposed along Highway K, including the Walmar development, obviously will have a significant impact on the traffic levels, flow and safety in the surrounding area.

18. To coordinate the development and the resulting burdens and impact on the traffic in the area, the City

hired a traffic consulting firm, Crawford, Bunte and Brammaier (CBB), which monitored and studied the traffic and traffic patterns in this area for O'Fallon and also performed traffic studies related to the specific site developments being proposed. CBB determined that signalized access was needed in order to have adequate access to and from the Walmar site as well as from the Mobil site directly across Highway K. Without a signalized access, the flow of traffic along Highway K and to and from the Walmar site would be unacceptable. Visitors to and from the site would have difficulty making a left-hand turn into and out of the site, and crossing heavy traffic on Highway K will cause safety problems and disruption of traffic.

19. In light of the planned developments, the traffic consultant recommended to the City that three traffic signals be placed on Highway K in this area: (1) one signal at the intersection of Highway K and Weldon Spring Road near the Quik Trip; (2) one signal at the intersection of Crusher Road and Highway K which would facilitate access to both the Mobil Mart and the Walmar site; and (3) a signal at the Highway K entrance to the Taylor Morley site.

20. The traffic studies also showed that the approximate daily traffic that the Walmar site will attract or which would flow through the site will be at least 2500 vehicles per day, which pursuant to O'Fallon Ordinance Section 405.380 requires a collector street 36 feet wide within a 60-foot right-of-way. The traffic consultant also determined that when the traffic generated by the developments surrounding Walmar, as well as the traffic generated by Walmar itself, is taken into consideration,

the level of traffic will greatly exceed the approximate average daily traffic of 2500 vehicles.

21. Because of the existing and proposed development activity in the south Highway K area, including the Walmar development, O'Fallon in August 1999 amended its Comprehensive Plan to provide for a collector loop road by extending Crusher Drive on either side of Highway K to Weldon Spring Road. CBB's report on the Walmar site also supported the connection of Crusher Drive to both east and west of Weldon Spring Road.

22. The Planning & Zoning Commission's staff prepared an initial report dated June 22, 1999 commenting upon Walmar's site development plan and advised Walmar that (1) the plan be revised to align the access from Highway K with the existing Crusher Drive on the west side of Highway K; (2) Walmar contact the City's traffic consultant CBB to provide a traffic study that would examine the site in conjunction with the proposed Taylor Morley development to the north and review access points, cross access and a collector roadway running through the site.

23. Walmar submitted a revised plan on June 30, 1999 which in all relevant respects was the same as the one submitted earlier in June. It continued to depict a 30-foot wide street running from Highway K through the proposed development. The staff prepared a subsequent report dated July 8, 1999, again advising (1) Walmar to provide a right-of-way dedication for a total of 30 feet from the center line along Weldon Spring Road, (2) align the access of Highway K with the existing Crusher Drive on the west side of Highway K where a traffic signal was planned, and (3) provide a traffic analysis through the

City's traffic consultant that reviews Highway K access, cross access, and a collector roadway running through the site, and (4) to allow cross access.

24. Finally, Walmar submitted another revised site development to Planning & Zoning Commission on September 15, 1999. The revised plan did align the entrance of the proposed street running through the site from Highway K to Weldon Spring Road with Crusher Drive, however, the width of the street was reduced from the previously proposed 30 feet to 27 feet, even though since June 1997 Walmar was on notice that the street had to be 36 feet wide to comply with O'Fallon's ordinances.

25. Walmar never applied to O'Fallon's Board of Adjustment for a variance or relief from O'Fallon's requirements that the street be 36 feet wide with a 60 foot right-of-way or for any variance or relief from any setback requirements. Sections 45.360 [sic] and 400.705 of O'Fallon's ordinances provide remedies and procedures for obtaining such variances.

26. The Planning & Zoning Commission staff prepared a report on the September 15 site plan. It recommended approval of the site plan subject to a number of conditions, including (1) Walmar would agree to provide a right-of-way dedication for a total of 30 feet from the center line along Weldon Spring Road when any development plan is received by the City for that portion of the property that fronts Weldon Spring Road; (2) Walmar would agree to allow close access between its property and the property to the north and south when those properties are developed and to enter into necessary agreements concerning such access with the developers of the property; and (3) Walmar would provide for a public collector

road from Highway K to Weldon Spring Road 36 feet wide within a 60 feet right-of-way.

27. Although the Planning & Zoning Commission staff was willing to attempt to resolve any differences with Walmar, Walmar was unwilling to negotiate the conditions for approval relating to cross access, the collector road and the potential future and contingent right-of-way dedication along Weldon Spring Road.

28. Walmar's representatives appeared before the Planning & Zoning Commission hearing on September 28, 1999 and presented Walmar's case for approval of its September 15 site development plan. Walmar made it clear to the Commission that it was not willing to negotiate any differences with the Planning & Zoning Commission staff.

29. The Planning & Zoning Commissioners on September 28, 1999, voted unanimously to approve the Walmar site development plan with the conditions recommended by the staff. The Commission issued its certificate of conditional approval for the Walmar site on September 29, 1999.

30. Section 400.585 of O'Fallon's ordinances sets forth the standards for site plan review by the Planning & Zoning Commission. In reviewing the site plan, the Commission is required to assure (1) it is consistent with O'Fallon's ordinances; (2) that the movement of vehicular and pedestrian traffic within the site and in relation to access streets shall be safe and convenient; (3) provisions are made so that the proposed development will not be harmful to the existing and future uses in the immediate area and vicinity; (4) all site plans need to adhere to the standards set forth in Article 13. The Commissioners

testified that they base their decision on their reasoned judgment taking into consideration their personal knowledge, the applicable facts and circumstances, their personal experience, and the work and recommendations of the City's planning department as well as the traffic consultants reports.

31. The site development plan as presented to the Planning & Zoning Commission at its hearing on September 28, 1999 did not comply with the City's ordinances. The plan called for a road running from Highway K through to Weldon Spring Road but it only showed a pavement with a 27 feet wide [sic]. The street shown on the site plan was a collector street as defined by the City's ordinances and all collector streets, whether private or public, are required to be at least 36 feet wide within a 60 foot right-of-way pursuant to Sections 400.030, 405.035, 405.180, 405.380 and 405.410. The site plan also did not conform to O'Fallon's Comprehensive Plan which showed a collector road running from Highway K east to Weldon Spring Road.

32. The standards applied by O'Fallon's Planning & Zoning Commission in exercising its discretion and duty in reviewing site development plans are publicly known. All Planning & Zoning Commission meetings in O'Fallon are open to the public and televised on Channel 13, a local cable channel.

33. The conditions for approval determined by the Planning & Zoning Commission were reasonably and directly related to the burdens on the traffic and the City of O'Fallon that will be created by the Walmar 18.5 acre plan development along Highway K and Weldon Spring Road. The 18.5 acre plan development will most certainly

create increased traffic and traffic problems including concerns for safety. Each of the three conditions are directly and reasonably related to and are reasonably intended and necessary to mitigate the burdens that the Walmar site will create.

34. The conditional approval of the Walmar site was normal and usual and did not in any way single out the Walmar property for disparate treatment.

35. Any detriment that Walmar may suffer from the approval conditions is offset and balanced by the benefits it has received and will receive from O'Fallon, including enhanced value to its property by O'Fallon's widening and improving Highway K and Weldon Spring Road, by O'Fallon's development policies resulting in substantial residential and commercial growth in the area, by providing a $200,000 traffic light for access to the Walmar site at no cost to Walmar and by assuming the maintenance and upkeep of the street running through the Walmar site.

36. The three conditions of approval will not prevent the site from being viably developed. There is evidence that they will enhance the site's development value.

37. The reason for conditioning approval on Walmar's agreement to enter into cross access agreements with neighboring developments is to mitigate the burden that the Walmar site development will have on the major roads abutting the property including Highway K and Weldon Spring Road by allowing persons to go from one development to another without going back onto Highway K or Weldon Spring Road and driving a few hundred feet on the road and then entering a neighboring development. The condition is intended and reasonably designed and necessary to alleviate what is referred to as "dart-in and

dart-out" traffic and will minimize the disruption to the traffic on Highway K and Weldon Spring Road that will be caused by the Walmar development.

38. It is usual and normal for municipalities in the surrounding St. Louis area to require cross access agreements by commercial developers as a condition for site approval. Plaintiff's own engineer testified that cross access agreements are common in St. Louis and St. Charles Counties and he, himself, has negotiated numerous such agreements for clients. Cross access consistently was required by O'Fallon's Planning & Zoning Commission of other site developments along the Highway K corridor and has been agreed to by numerous developers in O'Fallon.

39. The approval conditions to widen Walmar's proposed street from 27 feet to 36 feet wide and to make it a public street to conform to the City's ordinances and to the City's Comprehensive Plan was directly related to the site development and required by the level of traffic and traffic patterns that it will create. The only difference between what Walmar proposed and the approval condition is that instead of being 27 feet or 30 feet wide, the pavement of the road would be 36 feet wide and would be owned and maintained by the City. The condition was a result of a careful and thorough and integrated plan to deal with the traffic and the impact on the surrounding area and roads that will be created and contributed to by Walmar's development of the site.

40. The City's requirements that the street be a public street will allow the City to control access to the road, to keep the road open and to provide police protection, snow removal and other required maintenance to a

street that would be heavily traveled by residents and visitors to the Walmar site.

41. In the event Walmar needed or desired a variance from a 60 foot right-of-way or 36 foot wide pavement requirement or any setback requirements, Walmar could have requested a variance or relief from those requirements from the Board of Adjustment pursuant to Sections 400.705 or 405.360 of O'Fallon's ordinance. Walmar, however, made no effort to do so.

42. The Taylor Morley development to the north of the Walmar site also showed a street running through from Highway K to Weldon Spring Road on the east. As a condition of approval the Planning & Zoning Commission required it also to assure that the plan conformed to the City's requirements for a collector street. Taylor Morley constructed a paved road 36 feet wide within a 60 foot right-of-way as required by the City's Ordinances.

43. The Commission's requirement that Walmar agree that if and when Walmar develops the property abutting Weldon Spring Road, that Walmar then will dedicate a right-of-way to the City for widening of Weldon Spring Road, directly and reasonably relates to the proposed site development and the burdens that it will create. It is common practice for Planning & Zoning Commissions to require right-of-way dedications for roads abutting the property proposed to be developed. Walmar's plan showed a major entrance with a large sign from Weldon Spring Road directing traffic into the Walmar site. It was reasonable to require Walmar to dedicate a right-of-way to widen Weldon Spring to accommodate the additional traffic that would be caused by the development. Taylor Morley had agreed to dedicate right-of-way along its portion of Weldon

Spring Road and Quik Trip also had agreed to dedicate a right-of-way along its property for the widening of Weldon Spring Road. Walmar was being requested only to dedicate its proportionate share of the right-of-way.

44. Walmar had already dedicated to Duckett Creek Sanitary District an easement along that part of the Walmar site fronting Weldon Spring Road which could not be built on. O'Fallon Ordinance § 405.210.B authorizes the City to require any developer to pay for bringing any road abutting the developer's property up to the required standards. Walmar was only being asked to dedicate a right-of-way for the widening of the road if and when it proceeded with the additional development of the site.

45. The court finds that the Planning & Zoning Commission's decision to conditionally approve Walmar's plan was not arbitrary, capricious or unreasonable.

FINDINGS OF LAW

1. Mandamus is an extraordinary remedy and should be issued only in exceptional circumstances. It should not issue unless the party seeking the writ shows a clear, unequivocal right to have performed the thing demanded and that respondent has a corresponding duty to perform the action sought. Walmar is required under Missouri law to make an unequivocal showing by clear and convincing evidence that respondents had a ministerial duty to approve the site development plan unconditionally and that respondents acted arbitrarily and unreasonably. *State ex rel Kelly v Mitchell*, 595 S.W.2d 261 (Mo. 1980); *Westside Development v Weatherby Lake*, 935 S.W.2d 634 (Mo. App. 1996); *State ex rel LS Alberici Inc v City of Fenton*, 576 S.W.2d 574 (Mo. App. 1979); *Daveco Food*

Incorp Inc v City of Bridgeton, 725 S.W.2d 32 (Mo. App. 1986). Walmar has failed to meet its burden under Missouri law for a writ of mandamus compelling the City of O'Fallon and its Planning & Zoning Commission to approve Walmar's site plan unconditionally.

2. The City of O'Fallon and its Planning & Zoning Commission did not have a ministerial duty to unconditionally approve Walmar's site plan. Mandamus is appropriate only where it is to compel a ministerial duty. Before there can be any ministerial duty for the Planning & Zoning Commission to approve the site plan, Walmar's plan must comply and conform with the City's applicable ordinances. *State ex rel Westside Development Co, Inc v Weatherby Lake*, 935 S.W.2d 634 (Mo. App. 1996); *State ex rel Schaeffer v Cleveland*, 847 S.W.2d 867 (Mo. App. 1992). Walmar's site plan did not comply with the applicable O'Fallon's ordinances. The street shown on the site development plan running from Highway K through the site to Weldon Spring Road was shown as only 27 foot wide whereas O'Fallon's ordinances requires such a street to be at least 36 feet wide in width within a 60 foot right-of-way. Walmar was advised of this requirement when it submitted its first site development plan in June 1997 but never sought a variance from O'Fallon's requirements governing specifications for streets.

3. Because O'Fallon had adopted a Comprehensive Plan, pursuant to § 89.380, R.S.Mo., the street shown on the Walmar site plan could not be constructed or authorized in O'Fallon until its extent, location and character had been submitted to and improved [sic] by the Commission. The street shown on Walmar's site development plan did not conform or comply with the City's comprehensive plan which provided for a public collector street 36 foot

wide within a 60 foot right-of-way. Not only was there no ministerial duty for the Commission to approve the plan, but it would have been an abuse of discretion to approve a plan which violated the City's ordinances, particularly when the developer did not request any variances from those ordinances.

4. The Planning & Zoning Commission followed the City's standards for site plan review which required the Commission to ascertain and assure (1) the plan is consistent with all regulations, (2) that the movement of vehicular and pedestrian traffic within the site and in relation to access streets shall be safe and convenient; and (3) that the proposed development will not be harmful to the existing and future uses in the immediate area and vicinity. The Commission did not abuse its discretion or act unreasonably in finding that the approval conditions to provide for cross access, widen the proposed street from 27 feet to 36 feet and to make it a public road and to agree that if and when the property is developed along Weldon Spring Road to dedicate a right-of-way to widen Weldon Spring Road, were necessary to assure that the movement of vehicular and pedestrian traffic within the site and in relation to access streets shall be safe and convenient and that the proposed development will not be harmful to the existing and future uses in the immediate area and vicinity. The approval conditions were reasonably and directly related to and reasonably required to accommodate the burdens that will be caused by Walmar's proposed development. The approval conditions met the "reasonable relationship test" described by the Missouri Supreme Court in *State ex rel Nollan v St Louis County*, 487 S.W.2d 386 (Mo. 1972).

5. Both *Nollan v California Coastal Commission*, 483 U.S. 825 (1982), and *Dolan v City of Tigard*, 512 U.S. 374 (1994), upon which Walmar relies, are factually distinguishable from the Walmar in this matter. In *Nollan* the Court found that the required condition was not reasonably related to the stated purpose of the condition. In contrast, the three conditions to which Walmar objects are directly and reasonably related to the burdens they are intended to mitigate. The *Dolan* case rested its decision on the conclusions that (1) the required relationship between the flood plain easement and the petitioner's new building was lacking and (2) the City failed to show that a bicycle path would offset some of the traffic demands generated by the increased building size, explaining that the "findings of fact that a bicycle path *could* offset some of the traffic demands is a far cry from finding that the bicycle path system *will*, or is *likely to* offset some of the traffic demand." In contrast, the approval conditions in Walmar are admittedly essentially and reasonably related to the development and the impact that it will have on the traffic and safety. The evidence is that the approval conditions *will* offset the inevitable burdens not that they *could* or *may* do so.

6. The Court also finds that Walmar failed to exhaust its administrative remedies and, therefore, for this additional reason, its petition for writ of mandamus is denied. *State ex rel Maynes Construction Company Inc v City of Wildwood*, 965 S.W.2d 949 (Mo. App. 1998); *State ex rel Foget* [sic] *v Franklin County*, 809 S.W.2d 430 (Mo. App. 1991); *N G Heimos Greenhouse, Inc v City of Sunset Hills*, 597 S.W.2d 261 (Mo. App. 1980); *State ex rel LS Alberici, Inc v City of Fenton*, 576 S.W.2d 574 (Mo. App. 1979). Pursuant to Section 89.380, R.S.Mo., any

disapproval by the Planning & Zoning Commission to authorize the construction of a street and its location, extent and character in O'Fallon can be overruled by the City Council by a vote of not less than two-thirds of its membership. Failure of the Commission to approve the street as shown on the site development plan amounts to a denial of constructing the proposed street as planned. Although Walmar was afforded an administrative remedy pursuant to 89.830 to have that decision overruled by the Board of Aldermen, Walmar failed to pursue that remedy and to seek to have the O'Fallon Board of Alderman [sic] overrule the Planning & Zoning Commission's decision as it related to the street. Further, Walmar failed to work with the Planning & Zoning staff to resolve any differences and failed to appeal the Planning & Zoning Commission's conditional approval to the Board of Adjustment pursuant to Sections 89.01 or 89.140. Walmar also failed to seek variances from O'Fallon's street regulations from the Board of Adjustment as provided by Sections 400.705 and 405.360.

7. Walmar's petition for writ of mandamus is also time barred since it was not filed within the statutory time limit of 30 days for review of administrative decisions. Reviews of planning and zoning decisions are governed by Chapter 89, R.S.Mo., or Chapter 536, R.S.Mo. *Nigh v City of Savannah*, 956 S.W.2d 451 (Mo. App. 1987); *Deffenbaugh Industries, Inc v Potts*, 809 [sic] S.W.2d 520 (Mo. App. 1990). Both Sections 89.110 and Chapter 536 require that all petitions for review of the challenged administrative decision must be filed within 30 days. This requirement is jurisdictional. *State ex rel Henze v Wetzel*, 754 S.W.2d 895 (Mo. App. 1988). *State ex rel Forget v Franklin County*, 809 S.W.2d 430, 433 (Mo. App. 1991).

8. The Planning & Zoning Commission's certificate of conditional approval of the Walmar site plan has expired and is no longer in effect, and a writ of mandamus cannot resurrect the site plan certificate that has expired. O'Fallon City Ordinance Section 400.595 provides that a site plan certificate shall expire in 180 days after its issuance unless a building permit for the proposed work authorized under the said site certificate has been issued and in any event shall expire 360 days after the date of its issuance if construction has not begun and pursued diligently. Walmar did not obtain a building permit for any proposed work authorized under the site certificate issued on September 29, 1999, and more than 360 days have now passed since that time. Walmar took no steps to seek or obtain any injunctive relief or other order to maintain the status quo or preclude the site plan certificate from expiring. Mandamus is not an appropriate remedy to order the Planning & Zoning Commission to issue an unconditional site plan certificate long after the conditional certificate of approval has expired. The writ of mandamus sought by Walmar would improperly deprive the Commission of its right pursuant to the ordinance to expect the site would be developed pursuant to an approved plan within 30 days after its issuance, and if it is not, the Commission has the right to consider it again, in light of conditions that have transpired since the conditional approval.

9. Mandamus is not available to Walmar for the additional reason that Walmar had other adequate remedies available. Mandamus will not issue where there is another adequate remedy available to relator. *State ex rel Kelly v Mitchell*, 595 S.W.2d 261, 265 (Mo. 1980). Walmar has administrative remedies available, as well as the

remedies of petition for writ of certiorari and judicial review. *Nigh v City of Savanah* [sic], 956 S.W.2d 451, 453 (Mo. App. 1997); *Devenbaugh* [sic] *Industries, Inc v Potts*, 802 S.W.2d 520 (Mo. App. 1990.

/s/ Nancy Schneider 5/18/01
Nancy Schneider
Circuit Judge

[SEAL] OCT 09 2002

In the Missouri Court of Appeals

Eastern District

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: October 8, 2002

RE: Motions For Rehearing And/Or Transfer To Supreme Court Denied

1. ED78785 JOHN DOE, APP V TCI CABLEVISION OF MO, ET AL, RES
2. ED79607 WALMAR INV CO, APP V CHARLES BRUNJES, ET AL, RES
3. ED79644 STATE OF MISSOURI, RES V JAMES MOORE, APP
4. ED79788 DOROTHY ECHARD, ET AL, RES V BARNES-JEWISH HOSP, APP
5. ED79985 STATE OF MISSOURI, RES V CRAIG MORRISON, APP
6. ED80038 SUNSET GROVE INV, RES V TITLE INSURERS AGENCY, APP
7. ED80415 CTY OF BRECKENRIDGE HILL, RES V GARY PARKER, APP
8. ED80492 IN THE MATTER OF: J.D.M.
9. ED80493 IN THE INT. OF: M.J. AND S.J.

In the Supreme Court of Missouri

SC84865
ED79607

September Session, 2002

Walmar Investment Company,

Appellant,

vs. (TRANSFER)

Charles Brunjes, et al.,

Respondents.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2002, and on the 26th day of November, 2002, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 26th day of November, 2002.

/s/ Thomas F. Simon Clerk

_____ D.C.

(2)

Supreme Court, U.S.
FILED
MAR 24 2003
CLERK

No. 02-1220

In The

Supreme Court of the United States

WALMAR INVESTMENT COMPANY,

Petitioner,

v.

CHARLES BRUNJES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the Missouri Court of Appeals properly applied this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), when determining the propriety of three conditions placed on a land development.

PARTIES TO THE PROCEEDINGS BELOW

The petitioner in this proceeding is Walmar Investment Company. Respondents are Charles Brunjes, Ron Fowler, Henry Dussold, Bob Englehart, Donald Barr, Jr., Dan Brungard, Carolyn Thomas, Cheryl Hibbeler and Paul Renaud, in their official capacities as members of the City of O'Fallon's Planning and Zoning Commission. The remaining respondent is the City of O'Fallon, Missouri.

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OPINIONS AND ORDERS BELOW

The Judgment and Findings of Fact and Conclusions of Law of the Circuit Court of St. Charles County, Missouri are unreported. (App. 17-38). The Order of the Missouri Court of Appeals, Eastern District, is reported at 87 S.W.3d 349. The Missouri Court of Appeals' Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) is unreported. (App. 1-14). The Order of the Missouri Court of Appeals, Eastern District, denying the Motion for Rehearing and/or for Transfer to the Missouri Supreme Court is unreported. (App. 39). The Missouri Supreme Court's denial of petitioner's Application for Transfer also is unreported. (App. 40).

JURISDICTIONAL STATEMENT

On May 18, 2001, the Circuit Court of St. Charles County, Missouri, denied a petition for writ of mandamus filed by Walmar Investment Company ("Walmar"), seeking to compel the Planning and Zoning Commission ("P&Z Commission") of the City of O'Fallon, Missouri, to approve a site development plan despite Walmar's failure to comply with three approval conditions. (App. 38). Walmar sought appellate review of the denial, and the Missouri Court of Appeals, Eastern District, issued its Order affirming the denial of a writ of mandamus on August 20, 2002. (App. 1-14). The Missouri Court of Appeals, Eastern District, denied petitioner's Motion for Rehearing and/or for Transfer to the Missouri Supreme Court on October 8, 2002. (App. 15). The Missouri Supreme Court denied petitioner's Application for Transfer on November 26, 2002. (App. 15). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

Invocation of this Court's jurisdiction is improper because the Missouri Court of Appeals did not possess subject matter jurisdiction over the instant case. Missouri courts lacks subject matter jurisdiction to decide a petition for writ of mandamus where an adequate alternative remedy is available. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 265 (Mo. 1980). Walmar was free to seek judicial review of the decision of the P&Z Commission under § 536.140 R.S.Mo. (App. 37). Because Walmar had an adequate alternative remedy, the Missouri Court of Appeals lacked jurisdiction to hear Walmar's Petition.

Further, the Missouri Court of Appeals lacked jurisdiction because Walmar did not exhaust its administrative remedies before seeking judicial review. *State ex rel. Maynes Constr. Co., Inc. v. City of Wildwood*, 965 S.W.2d 949, 952 (Mo.Ct.App. 1998). Pursuant to § 89.380 R.S.Mo., Walmar could have sought review of the P&Z Commission's decision through the City's Board of Aldermen. (App. 35-36). Walmar also could have appealed to the Board of Adjustments or sought a variance. (App. 36). Because Walmar failed to exhaust available remedies, the Missouri Court of Appeals lacked jurisdiction to hear its appeal.

Further, the trial court correctly held that Walmar's petition for writ of mandamus was time barred because it was filed after expiration of the thirty-day time limit for review of administrative decisions. (*Id.*); § 536.110.1 R.S.Mo. The time limit for filing the petition for review is jurisdictional. *See Community Fed. Sav. & Loan Ass'n v. Director of Revenue*, 752 S.W.2d 794, 799 (Mo. banc 1988). The trial court also correctly denied the writ of mandamus because the P&Z Commission's conditional approval of the site plan had expired and, as a result, the issue before the

trial court had become essentially moot. (App. 37). A writ of mandamus will not issue where, if granted, it will be unavailing. *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo.Ct.App. 1993). For the reasons stated above, this Court does not have jurisdiction over petitioner's claims and further review should be denied.

STATEMENT OF THE CASE

Respondents are the City of O'Fallon, Missouri (hereinafter "O'Fallon" or "the City") and members of the P&Z Commission for the City of O'Fallon. (App. 19). O'Fallon is one of the fastest growing cities in the State of Missouri. (*Id.*). Only two major thoroughfares run north and south to Highway 70 through O'Fallon. (App. 19). The main and central thoroughfare is Highway K. (*Id.*). The level of traffic on Highway K has increased significantly in the past few years, and it is expected that the level of traffic will continue to increase as development in the City continues. (App. 19-20).

Pursuant to Chapter 89, R.S.Mo., the City has adopted ordinances regulating improvements and land development in the City of O'Fallon. (App. 20). The general purpose of these ordinances is to regulate and control land development so as to promote public safety, health and the general welfare of the community. (*Id.*). The City also adopted a Comprehensive Plan to promote these same purposes and to protect the interests of the public. (*Id.*). Pursuant to the City ordinances, the P&Z Commission is empowered to review site plans for proposed developments within the City. (*Id.*).

Walmar is one of a number of developers that in the past few years has applied to the P&Z Commission for approval to develop commercial sites between Highway K and Weldon Spring Road. (App. 21). In June 1997, Walmar submitted its first site development plan. (*Id.*). The proposed plan showed detailed development for about five acres of the tract, with the remaining acres marked for future development. (App. 22). The site development plan also showed a thirty foot wide paved road running through the Walmar Property from Highway K to Weldon Spring Road. (*Id.*).

The P&Z Commission staff reviewed the proposed site development plan and commented that (1) the City will need a right-of-way dedication along Weldon Spring Road; (2) City ordinances require all commercial drives in the City of O'Fallon be thirty-six feet wide and be built to collector road standards;[1] and (3) the site is not in conformance with the Comprehensive Plan. (*Id.*). Thus, the P&Z Commission advised Walmar in July, 1997 that its site plan did not comply with the City's ordinances requiring commercial drives to be thirty-six feet wide and built to collector street standards. (*Id.*).

---

[1] Section 405.030 of the City ordinances defines "collector streets" as streets that "gather traffic from local streets and carry it to arterial streets where such traffic can then proceed to its destination." Section 405.030 further states that collector streets should be planned in such a manner to clearly provide a "collector" service for a neighborhood and development unit, but inhibit through traffic movement between neighborhoods or adjacent development units. Minimum rights-of-way for collector streets are sixty feet and minimum pavement width is thirty-six feet. § 405.370. Although Walmar's proposed road met the definition of a collector street, it did not meet collector street standards.

In July of 1997, Walmar asked the City's planning department to put its request for approval of its site development plan on hold, as it was having difficulty obtaining access to a sanitary sewer. (*Id.*). No further action was taken until June 1999, when Walmar submitted a revised site development plan to the P&Z Commission for the Walmar property. (*Id.*). The revised June of 1999 Plan also showed a thirty foot wide paved street running from Highway K through the Walmar Property to Weldon Spring Road. (*Id.*). The June of 1999 Plan was for a commercial shopping mall, including a proposed restaurant and it included proposed entrances on Highway K and Weldon Spring Road. (App. 23).

The P&Z Commission staff prepared an initial report, dated June 22, 1999, requesting that: (1) the plan be revised to align the access from Highway K with the existing Crusher Drive on the west side of Highway K; and (2) Walmar contact the City's traffic consultant, Crawford, Bunte & Brammaier ("CBB"), to provide a traffic study that would examine the site in conjunction with the proposed Taylor-Morley development to the north and review access points, cross access, and a collector roadway running through the site. (App. 25).

A revised site plan was submitted by Walmar on June 30, 1999, which continued to depict a thirty foot wide street running from Highway K through the proposed development. (*Id.*). In the meantime, the staff prepared a subsequent report dated July 8, 1999, recommending approval of the June 30, 1999 Plan conditioned on eleven separate comments, including requests for Walmar: (1) to provide a right-of-way dedication for a total of thirty feet from center line along Weldon Spring Road; (2) move the northern access point on Highway K to align it with the

existing Crusher Drive on the west side of Highway K where a traffic signal was planned; (3) provide a traffic analysis via the City's traffic consultant CBB that, at a minimum, reviews Highway K access, cross access and a collector roadway running through the site from Highway K to Weldon Spring Road; and (4) to allow cross access. (App. 25-26).

During the same time frame when Walmar was submitting its revised development plan in June 1999, other site development plans were being submitted for properties along south Highway K near the Walmar Property. (App. 23). As a result of these proposed developments, the City employed CBB to perform traffic studies related to specific site developments. (App. 24). Based on its studies, CBB recommended that three traffic signals be placed on Highway K in this area: (1) one signal at the intersection of Highway K and Weldon Spring Road near the Quik Trip; (2) one signal at the corner of Crusher Road and Highway K which could facilitate access to both the Mobil Mart and the Walmar site; and (3) a traffic light at the entrance to the Taylor-Morley site. (*Id.*). CBB also recommended that Crusher Road be extended from Weldon Spring Road on the west through to Highway K and from Highway K through the Walmar Property to Weldon Spring Road on the east as a collector loop. (App. 25). Based on these findings, the City amended its Comprehensive Plan to reflect such an extension of Crusher Road through the Walmar Property. (*Id.*).

Based on the traffic studies, CBB determined that the Walmar development will generate traffic at the level of approximately 2,500 vehicles per day. (*Id.*). To date, Walmar has offered no evidence controverting this finding. This traffic increase is in addition to the substantial traffic

flow that currently exists on south Highway K and the expected increase in that traffic flow as other developments along the highway are completed. (App. 24-25).[2]

Walmar submitted a final revised site development plan to the P&Z Commission on September 15, 1999. (App. 26). The revised plan did align the entrance of the proposed road running though the site from Highway K to Weldon Spring Road with Crusher Drive. (*Id.*). However, the width of the street was reduced from the previously proposed thirty feet to twenty-seven feet, even though Walmar was aware that O'Fallon ordinances required the street to be thirty-six feet wide. (*Id.*). The P&Z Commission staff prepared a report recommending approval subject to certain conditions, including: (1) Walmar agreeing to provide a right-of-way dedication along Weldon Spring Road when the area fronting that road is developed;[3] (2) Walmar agreeing to allow cross access between its property and the property to the north and south (when it is developed) and to enter into necessary agreements

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[2] Walmar erroneously contends that the P&Z Commission's decision was based solely on the CBB traffic study relating to the Walmar Property. To the contrary, the traffic study to which Walmar alludes was only part of the information before the P&Z Commission and upon which it based its decision. The P&Z staff had employed CBB beginning in the spring of 1999 to do traffic analyses and studies of the City's traffic patterns and streets, including Highway K and areas surrounding the Walmar Property. (Trial Transcript, 329). Information from these studies was available to the P&Z Commission. The Commissioners also live in and around the subject area and witness first hand the pattern and level of traffic in the area. (Trial Transcript, 430, 442-43).

[3] Walmar had already dedicated to Duckett Creek Sanitary District an easement that could not be built upon along this portion of the Walmar Property fronting Weldon Spring Road. (App. 32).

concerning such access with the developers of those properties; and (3) Walmar providing for a thirty-six foot wide public collector road within a sixty foot right-of-way from Highway K to Weldon Spring Road. (App. 26-27).

Walmar's representatives appeared at the P&Z Commission hearing on September 28, 1999 to present their case for approval of the September 15, 1999 Plan. (App. 27). Walmar representatives told the Commission that Walmar would not accept the conditions relating to cross access, the future and contingent right-of-way along Weldon Spring Road and the width of the collector street going through the Walmar Property. (*Id.*). At the September 28, 1999 hearing, the P&Z Commission voted to approve the September 15, 1999 Plan with the conditions recommended by P&Z Commission staff. (*Id.*). A certificate of conditional approval was then issued for the Walmar site development plan. (*Id.*).

Walmar refused to accept the conditions to approval and, instead, filed a Petition for Writ of Mandamus. Walmar filed its Petition rather than applying to the City's Board of Adjustment for a variance. (App. 36). Walmar also chose not to appeal the P&Z Commission's decision to the City Board of Adjustments or the Board of Aldermen. (*Id.*). On May 18, 2001, the Circuit Court of St. Charles County, Missouri, denied Walmar's petition for writ of mandamus. (App. 38). Walmar appealed this decision, and the Missouri Court of Appeals, Eastern District, issued its Order denying a writ of mandamus to petitioner on August 20, 2002. (App. 1).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE TESTS ENUNCIATED BY THIS COURT IN *DOLAN V. CITY OF TIGARD* AND *NOLLAN V. CALIFORNIA COASTAL COMMISSION.*

Granting the petition for certiorari requested by Walmar is unnecessary as the Missouri Court of Appeals explicitly analyzed the takings question at issue under the tests articulated by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (App. 6-7). In examining the requirements imposed by the P&Z Commission, the Court of Appeals explained:

> First, it must be determined whether there is an "essential nexus" between a legitimate state interest and the condition required by the City. *Nollan*, 483 U.S. at 387. If the required conditions are unrelated to the stated purpose, there is no "essential nexus" and the conditional requirement would constitute a taking. Second, assuming there is an essential nexus, it must be analyzed to determine the degree of connection between the required dedication and the projected impact of the proposed development. *Dolan*, 512 U.S. at 391. Under *Dolan*, there must be "rough proportionality" between the two.

(App. 6). Any suggestion that the Court of Appeals did not apply the *Nollan* and *Dolan* standards is belied by the explicit language of the Court of Appeals' Order.[4]

Petitioner's argument to the contrary relies purely on semantics. After enunciating and applying the standards provided in *Nollan* and *Dolan*, the Missouri Court of Appeals compared the rough proportionality test announced in these cases with the reasonable relationship test adopted in Missouri in 1972, before the Supreme Court's rulings in *Nollan* and *Dolan*. *See State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363, 367 (Mo. 1972). The Missouri Court of Appeals then reviewed the relevant case law and law review articles discussing the two tests and determined that the reasonable relationship test and the rough proportionality test were the same test. (App. 7) (finding "[b]oth tests result in the same conclusion"). The Court of Appeals then decided, as a matter of semantics alone, to call the test the "reasonable relationship" test throughout the rest of the opinion. (App. 7). Because the Court of Appeals applied the correct test for reviewing the conditions at issue, respondents respectfully submit that the petition should not be granted.

Further, and as shown by the Court of Appeals' analysis, the three approval conditions at issue clearly satisfy the "rough proportionality" test. The first condition

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[4] Because the Missouri Court of Appeals' decision is in accord with this Court's jurisprudence, it is likewise in accord with the cases decided by the United States Court of Appeals for the Eighth Circuit. For the sake of brevity, respondent will not separately address this portion of petitioner's argument.

required that Walmar construct a public collector road.[5] At the trial, O'Fallon presented the uncontroverted testimony of Craig Holan of CBB, who testified that the Walmar development would experience traffic at the rate of approximately 2,500 vehicles per day. (App. 9, 13). Mr. Holan's testimony was based on a traffic study commissioned by the City of O'Fallon to determine the effect of the proposed development on local traffic and roadways. (App. 9). Mr. Holan testified that the collector road requirement was directly related to Walmar's proposed development. (*Id.*). Thomas Ashburn, director of development services for O'Fallon, testified that the collector road would assure that the traffic movement within and in relation to the Walmar development would be safe and convenient. (*Id.*).

After reviewing this testimony and evidence, the Court of Appeals determined:

> The evidence in the case at bar demonstrated that a public collector road through Kingsmill will alleviate the burden Walmar's development will contribute to the traffic in the area. . . . By building the street to collector street standards, O'Fallon can ensure that the public has a safe and convenient means of traversing the Walmar property. Further, O'Fallon will be able to control access to the road, provide police protection, snow removal and other required maintenance to

[5] As discussed earlier, Walmar's own development plan required that a similar street be built in the Walmar development; however, Walmar's proposed street did not comply with O'Fallon's ordinances. (App. 8).

> a street that will be heavily traveled by residents and visitors to Kingsmill.

(*Id.*). The Court in *Dolan* specifically recognized that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." 512 U.S. at 395. The Missouri Court of Appeals properly determined that an essential nexus existed between the required collector road and the Walmar development and further determined that the requirement of the collector road was roughly proportional to the increased traffic to be caused by the Walmar development. (App. 9).

The Court of Appeals conducted the same *Dolan* and *Nollan* analysis for the condition requiring cross access to properties adjacent to the Walmar development. Mr. Holan testified that Highway K, O'Fallon's main thoroughfare, is already a heavily traveled road. (App. 9). Mr. Holan testified that the cross access will alleviate traffic from going on and off Highway K and further disrupting traffic on this busy roadway, by allowing vehicles to travel from one development to another without going onto this major road. (App. 9, 10). Mr. Ashburn further testified that the cross-access would provide the same function in lessening the traffic entering and exiting Weldon Spring Road, another busy O'Fallon street. (App. 10). The evidence in this case establishes that cross access will offset some of this traffic demand. The cross access requirement has an essential nexus to the Walmar development and this requirement is roughly proportional to the traffic increase that will be caused by Walmar. (App. 10).

The third condition requires Walmar to provide a right-of-way for widening Weldon Spring Road, if Walmar

chooses to develop property along that road. (*Id.*). Walmar's planned development showed a major entrance with a large sign from Weldon Spring Road directing traffic into the Walmar site. (App. 31). As the Court of Appeals determined: "The record demonstrates that when Walmar develops the property fronting Weldon Spring Road, traffic will increase. Dedication of a right-of-way to widen Weldon Spring Road will help accommodate this additional traffic." (App. 10). The Court of Appeals thus affirmed the trial court's determination that this condition "directly and reasonably relates to the proposed site development and the burdens that it will create." (App. 31).

Not only are the conditions roughly proportional to the impact of the Walmar development, but the conditions will not have a devastating impact on the property as Walmar claims. The trial court held that the conditions will actually benefit Walmar in the following ways:

> . . . enhanced value to its property by O'Fallon's widening and improving Highway K and Weldon Spring Road, by O'Fallon's development policies resulting in substantial residential and commercial growth in the area, by providing a $200,000 traffic light for access to the Walmar site at no cost to Walmar and by assuming the maintenance and upkeep of the street running through the Walmar site.

(App. 29). Walmar, however, misleadingly claims that the sixty foot right-of-way and setback requirements will cost it $1.4 million. (Petition 4). This is not true, as Walmar

has significantly distorted the cost difference between what it proposed and what the City ordinances require.[6] Walmar further complains that the "City's conditions would obliterate the retail development and future development of the entire 18.5 acre parcel." (Petition 4). However, it was Walmar, not the City of O'Fallon, that determined the position of the collector road. (App. 30). Additionally, Walmar has greatly exaggerated the difference between the amount of land that will be utilized for a collector street as opposed to a minor street. Even if Walmar was allowed to construct a thirty foot "minor street," a fifty foot right-of-way would be required. *See* City Ordinances, § 405.030.

Likewise, the right-of-way dedication along Weldon Spring Road will have only a slight impact upon the Walmar Property. Walmar has already dedicated an easement to the Duckett Creek Sanitary Sewer District along Weldon Spring Road upon which Walmar cannot build. (App. 32). Moreover, § 405.210.B of the City ordinances empowers the City to require a developer to pay for bringing the road abutting the developer's property up to

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[6] Using Walmar's own figures and math, the difference between the thirty foot street proposed by Walmar and a thirty-six foot collector street is approximately $70,000. (Walmar contends that the length of the proposed street is 1184.7 feet. Factoring the number by the extra 6 feet equals 7,108 square feet, and multiplying this by the $10 per square foot used by Walmar as the value of the Walmar Property equals $71,082). The difference between the value of a fifty foot right-of-way for a minor street (which is what Walmar claims the street should be defined as under the City ordinances), as opposed to a sixty foot right-of-way for a collector street, is approximately $118,000. (1184.7 x 10 foot = 11,847 square feet x $10 per square foot = $118,740). These amounts are a far cry from the $1.4 million figure claimed by Walmar.

the required standards. (App. 32). Here, Walmar was merely being asked to dedicate a right-of-way for the widening of the road if and when it proceeded with the additional development of the site. Because the conditions at issue satisfy the requirements set forth in the *Dolan* and *Nollan* opinions, respondents respectfully submit that the petition should not be granted.

II. THE MISSOURI COURT OF APPEALS PLACED THE BURDEN OF PROOF ON THE CORRECT PARTY IN DETERMINING THAT THE RESTRICTIONS PLACED ON THE WALMAR DEVELOPMENT WERE ROUGHLY PROPORTIONAL TO THE IMPACT OF THE PROPOSED DEVELOPMENT.

A. The Court of Appeals Clearly Required the City of O'Fallon to Bear the Burden of Proof.

Contrary to petitioner's assertions, the Missouri Court of Appeals did require the City of O'Fallon to bear the burden of showing that the conditions placed on the Walmar development were roughly proportional to the impact of the development. The Court of Appeals specifically held that Walmar "did not demonstrate *any failure by O'Fallon to satisfy* the reasonable relationship test in requiring the conditions for the approval of the site plan." (App. 8) (emphasis added). The language of the Court of Appeals' opinion clearly demonstrates that the City of O'Fallon, and not Walmar, was required to bear the burden of proof on issues relating to proportionality.

The Court then engaged in a lengthy discussion showing how the City of O'Fallon had met its burden of proof regarding each of the three disputed requirements.

Regarding the requirement that a road through the Walmar development be built to collector road standards, the Court of Appeals, after discussing the factual record developed at the trial court, found that the City of O'Fallon met the test "as to this condition." (App. 9). In discussing the cross access easement, the Court of Appeals noted O'Fallon had presented evidence and proved that the cross access "will alleviate traffic from going on and off Highway K and disrupting the flow of traffic." (App. 9-10). The Court again reiterated that O'Fallon had met its burden of proof regarding this condition. (App. 10). Regarding the right-of-way along Weldon Spring Road, the Court of Appeals discussed the evidence propounded by the City of O'Fallon regarding the necessity of such a right-of-way and found that O'Fallon had met its burden. (App. 9). Any suggestion that Walmar was somehow required to bear the burden of proof is simply unsupported by the record at trial, the evidence presented, the trial court's judgment, and the Court of Appeals' decision.

B. The Court of Appeals Placed the Burden of Proof on the City of O'Fallon, Even Though the Mandamus Remedy Sought by Walmar Required Walmar to First Prove by Clear and Unequivocal Evidence Its Right to the Relief Sought.

The Court of Appeals clearly placed the burden of proof on the City of O'Fallon. However, even assuming for the sake of argument that Walmar was required to bear the burden of proof, such a decision would have been proper, given that Walmar sought relief from the P&Z Commission's decision through a writ of mandamus. Regardless of its allegations of an unconstitutional taking,

Walmar was legally required under Missouri law to prove first by clear and unequivocal evidence its right to the relief sought.

The Missouri courts have long held that mandamus is an extraordinary remedy and should be issued only in exceptional circumstances. As the Missouri Supreme Court stated in *Kelley*, 595 S.W.2d at 265, mandamus "is essentially the exponent of judicial power and, hence is reserved for extraordinary emergencies." Additionally, mandamus will only issue to compel the performance of a ministerial duty, not a discretionary one. *State ex rel. Kessler v. Shay*, 820 S.W.2d 311, 314 (Mo.Ct.App. 1991). The ministerial duty sought to be coerced must be "simple and definite, arising under conditions admitted or proved and imposed by law." *Kelley*, 595 S.W.2d at 265. Mandamus cannot issue where the right is doubtful, or where there is another adequate remedy. *Id.*

The burden of proof in a mandamus action is placed squarely upon the relator. It must prove unequivocally that the respondent failed to perform a ministerial duty imposed by law. *State ex rel. Lupo v. City of Wentzville*, 886 S.W.2d 727, 731 (Mo.Ct.App. 1994). In other words, as the Court held in *State ex rel. J.S. Alberici v. City of Fenton*, 576 S.W.2d 574, 579 (Mo.Ct.App. 1979), the party seeking the writ must demonstrate a "clear, unequivocal, specific right to have performed the thing demanded and that the defendant or respondent has a corresponding duty to perform the action sought." Even though the Court of Appeals did not place the burden of proof on Walmar, requiring Walmar to prove that it was entitled to the mandamus relief sought would have been appropriate

under Missouri law. Accordingly, petitioner's claim warrants no further review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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